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Issue 19-2

C.A.L.L.

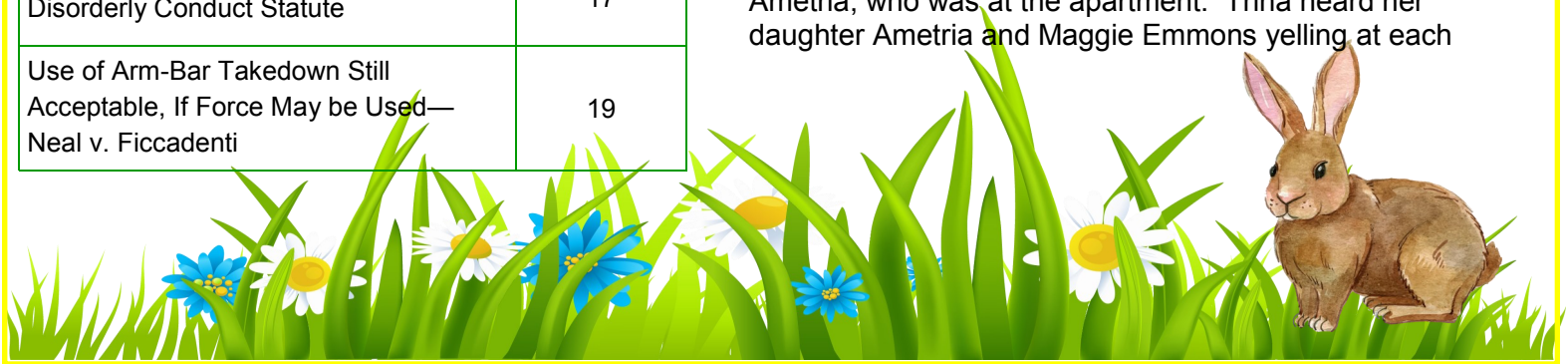
City Attorney Law Letter

Case Law

Supreme Court of United States Holds That Ninth Circuit U.S. Court of Appeals Improperly Denied Qualified Immunity to Officers on Excessive Force Claim Involving Domestic Violence Call Arrest

Facts Taken From the Case:

In April of 2013, Escondido, CA, police received a 911 call from Maggie Emmons about a domestic violence incident at her apartment. Emmons lived in the apartment with her husband, her two children, and a roommate, Ametria Douglas. Officers responded to the scene, took a domestic violence report, and arrested Emmons' husband. Weeks later, on May 27, 2013, at around 2:30 p.m., Escondido police received another 911 call about a possible domestic disturbance at Emmons' apartment. That 911 call came from Ametria Douglas' mother, Trina Douglas, who was not at the apartment, but who was on the phone with her daughter Ametria, who was at the apartment. Trina heard her daughter Ametria and Maggie Emmons yelling at each



other and heard Ametria screaming for help before the call disconnected. Trina then called 911.

Officer Houchin, who had responded to the April 911 call, again responded to the May 27 call, along with Officer Robert Craig. The dispatcher informed the officers that two children could be in the residence and that calls to the apartment had gone unanswered. Officers knocked on the door of the apartment, but no one answered. A side window was open, and officers spoke to Emmons through the window, attempting to convince her to open the door so that they could conduct a welfare check. An unidentifiable man in the apartment told Emmons to back away from the window. A few minutes later, a man opened the apartment door and came outside. Officer Craig, who was standing alone just outside the door, told the man not to close the door, but the man closed the door and tried to brush past Officer Craig. Officer Craig stopped the man, took him quickly to the ground, and handcuffed him. Officer Craig did not hit the man or display any weapon. The man was not in any visible or audible pain as a result of the takedown or while on the ground. Officers arrested the man for the misdemeanor offense of resisting and delaying a police officer.

The man who was arrested turned out to be Maggie Emmons' father, Marty Emmons. Marty later sued Officer Craig and Sergeant Toth, among others, under 42 U.S.C. § 1983, for excessive force in violation of the Fourth Amendment. The District Court held that the officers had probable cause to arrest Marty Emmons for the misdemeanor offense, and the District Court rejected Marty's excessive force claim. Because Officer Craig was the only officer to use force, the District Court granted summary judgment to Sergeant Toth on the excessive force claim, and the District Court granted summary judgment to Officer Craig on the issue of qualified immunity. The District Court held that the law did not clearly establish that Officer Craig could not take down an arrestee in these circumstances. The Court of Appeals for the Ninth Circuit reversed and remanded for trial on the excessive force claims against both Officer Craig and Sergeant Toth.

Argument and Decision by the Supreme Court of the United States

The United States Supreme Court reversed the judgment of the Court of Appeals for the Ninth Circuit as to Sergeant Toth, and vacated and remanded as to Officer Craig. As to Sergeant Toth, the Supreme Court held that the Ninth Circuit's unexplained reinstatement of the excessive force claim against Sergeant Toth was erroneous and quite puzzling in light of the District Court's conclusion that only Officer Craig was involved in the excessive force claim.

As to Officer Craig, the Supreme Court held that the Ninth Circuit also erred. The Supreme Court said that qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The clearly established right must be defined with specificity, and the Supreme Court has repeatedly told courts not to define clearly established law at a high level of generality. Regarding excessive force claims, the Supreme Court explained that specificity is especially important in the Fourth Amendment context, where it is sometimes difficult for an officer to determine how the relevant legal doctrine will apply to the factual situation confronted by the officer. Excessive force is an area of law in which the result depends very much on the facts of each case, and thus police are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue. It does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for trial on the question of reasonableness. An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.

The Supreme Court said that in this case the Ninth Circuit contravened the above settled

principles. The Ninth Circuit should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances, but instead it defined the clearly established right at a high level of generality. The Ninth Circuit's formulation of the clearly established right was far too general. The Supreme Court noted that while there does not have to be a case directly on point, the existing precedent must place the lawfulness of the particular action beyond debate. A body of relevant case law is usually necessary to clearly establish the answer. Since the Ninth Circuit failed to properly analyze whether clearly established law barred Officer Craig from stopping and taking down Marty Emmons, the case was remanded to the Ninth Circuit to conduct the proper analysis with respect to whether Officer Craig is entitled to qualified immunity.

Case: This case was decided by the Supreme Court of the United States on January 7, 2019, and was an appeal from the United States Court of Appeals for the Ninth Circuit. The case citation is *City of Escondido, CA, et al, v. Marty Emmons*, 586 U.S. _____ (2019).

Use of Force; Proportionality, Part I—*Karels v. Storz*

Brittany Karels was arrested for the charge of, *inter alia*, Disorderly Conduct under Minnesota law. During the arrest, Karels sustained numerous injuries. Karels sue the arresting officers and the City of Big Lake under 42 U.S.C. § 1983 alleging Civil Rights violations in the conduct of the arrest. Qualified immunity was denied to the arresting officers.

Facts.

Karels rented a room in the basement of Jennifer and Robert Owens' multilevel home in Big Lake, Minnesota. The house has an attached garage with two [**2] steps leading from the garage into the house. Karels is five feet, five inches tall and has described herself as being out of shape. At the time of her arrest, she weighed approximately 185 pounds and smoked cigarettes regularly.

On Friday, March 27, 2015, Karels drank a six-pack of beer after putting her five-year-old son to bed. Later that night, Jennifer reluctantly agreed to watch Karels's son while Karels went to purchase cigarettes.

Karels left the house around 1:30 a.m. on March 28. After she purchased cigarettes, Karels stopped at a bar in a nearby town, where she had two shots of liquor and smoked marijuana in the parking lot. Karels took a taxi home sometime after 2:30 a.m. and discovered that Jennifer had gone out to look for her. Karels called Jennifer, who soon returned to the house. The two women began arguing loudly outside the house. When the still-arguing women entered the house, Robert told Karels to go to her room. As the women continued to argue, he called 911 to report Karels as "a drunk that's being ignorant." He gave the dispatcher the address to his home and described Karels as "a friend living here."

Officers Storz and Norlin were dispatched to the scene. At that [**3] time, Storz had been

a police officer for approximately ten months. He was thirty-three years old, more than six feet tall, and physically fit. Norlin also was tall and fit.

Karels and Jennifer were still arguing in the house when Storz and Norlin arrived. The Owenses told the officers that they did not feel threatened by Karels, but that they wanted her to go to her room because she had been drinking and was being argumentative. Storz spoke to Karels outside as she smoked a cigarette. Karels cursed loudly, but then lowered her voice upon being instructed by Storz to do so. After Karels told Storz her side of the story, they returned to the house.

Storz then asked Karels for her identification. Karels did not remember whether she complied with his first request, but she testified that when she handed her driver's [*743] license to Storz, he poked her in the collarbone repeatedly and yelled, "calm down" or "back off." Karels then demanded to speak to the supervising officer. When the officers informed her that there was no supervisor on duty, Karels went into the garage to smoke another cigarette. Norlin followed her, while Storz remained in the house.

While in the garage, Karels called 911 twice [**4] to request a police sergeant or a deputy sheriff. According to the call transcripts, Karels told the dispatcher that two Big Lake police officers would not leave her alone and had assaulted her. The dispatcher told Karels that there was nothing she could do and that Karels could file a complaint with the police chief on Monday morning. It is undisputed that Karels was yelling and cursing at the dispatcher during the 911 calls.

During the second call, dispatch relayed to the officers that Karels kept calling 911 and making demands. After dispatch asked whether the officers planned to arrest Karels, Storz exited the house, went down the concrete steps, and entered the garage, where Karels was holding a lit cigarette in her right hand. An empty coffee can that served as an ashtray was located near the steps. Storz informed Karels that she was under arrest and instructed her to put her hands behind her back.

According to Karels, Storz quickly grabbed her left wrist and brought it behind her back. Karels tried to tell the officers that she was going to put the cigarette in the coffee can. She testified that Norlin had grabbed her right wrist, guiding it toward the coffee can, and away from [**5] Storz, so that she could dispose of the cigarette. As Storz felt Karels pull away from him, he commanded her to stop resisting arrest, to which Karels responded, "I've got a lit cigarette in my hand." Immediately after Norlin extinguished the cigarette and as she was reaching toward the coffee can, Storz twisted her left arm behind her and body-slammed her onto the concrete steps, causing Norlin to lose his grip on her wrist. She felt her left arm "twisted up almost where the bra strap line would be." Karels landed on her left side and felt searing pain in her left arm. Her glasses flew off her face. The back of her head hit the door, which slammed open and then shut, hitting Karels a second time. Storz landed on the ground next to her. Karels testified that mere seconds passed between the time Storz entered the garage to the time he slammed Karels onto the ground.

Storz disputes Karels's account of events leading up to his use of force, citing evidence that Karels was loud, aggressive, argumentative, and resistant. According to Storz, upon being informed that she was being arrested for disorderly conduct, Karels retorted that she would not do anything until she finished smoking her [**6] cigarette. Norlin then extinguished the cigarette and the officers grabbed hold of Karels's wrists. Storz was able to place Karels's left wrist in handcuffs. When Karels began swinging her shoulders,

trying to pull her arms away from the officers, she lunged forward and broke Norlin's grip from her right arm. By that time, Storz held only the handcuffs that were secured to Karels's left wrist and had no hold of her left arm. Storz's incident report states that he and Karels tripped over a concrete step as Karels pulled away from him, and that they then fell to the ground.

The officers placed Karels in handcuffs, pulled her to a standing position, and escorted her to the squad car. When they searched Karels, they found a marijuana pipe and a small amount of marijuana.

Karels complained repeatedly about her left arm. She later described the pain as [*744] feeling "like a very strong vise clamping down on my upper left arm." She thought that she was being restrained in a new style of handcuffs that secured the upper arm, so she repeatedly asked the officers to move or loosen the handcuffs. Karels requested medical attention, but refused to allow the paramedics to examine her when an ambulance [**7] arrived.

Norlin transported Karels to the county jail, where she continued to complain about left arm pain and numbness. During booking, a sergeant examined Karels and felt a grinding in her left arm, which is indicative of a broken bone. He refused to accept custody of Karels because she needed medical attention. The sergeant placed her arm in a splint, and Norlin transported her to a nearby hospital, where an X-ray revealed that Karels had a fracture of the left humerus bone. Karels was then transported to a hospital in St. Cloud, Minnesota, for emergency surgery on what was found to be a spiral, comminuted shaft fracture, with the radial nerve interposed at the fracture site and wrapped around a fracture fragment.

Karels v. Storz, 906 F.3d 740, 742-44 (8th Cir. 2018)*Karels v. Storz*, 906 F.3d 740, 742 (8th Cir. 2018)

Law.

Reasonable force may be used to place a suspect under arrest. Among the factors considered, the Court will specifically look at "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight" in determining whether the amount of force used was reasonable. *Karels v. Storz*, 906 F.3d 740, 745 (8th Cir. 2018).

Analysis.

In the case at bar, the suspect, now plaintiff, was engaged in arguably illegal conduct within her home. The location of the home does create a legal distinction in that there is no public exigency to quell the disturbance. The complainants were characterized as enduring annoyance, but not fear or danger. No weapons were involved. The conduct at issue was characterized as drunk and argumentative, but not as resisting. A pro forma filled out by arresting officers classified the employed force as to "effect an arrest."

At issue was the conduct that took place as Officer Storz tried to handcuff Karels. Storz grabbed Karels by the arm and moved her hand, which was holding a cigarette, to an ash can. In doing so, Karels tried to pull away. One cuff was applied, but Karels pulled away before the other cuff was secured. In the subsequent struggle, Karels' arm was twisted, bent upward and injured. Karels wound up on the ground, thrown there, according to Karels' version of events.

The arrest, itself, was not contested. The only issue dealt with the amount of force used to effect the arrest. Specifically, Karels argues she was not given time to comply with officer instructions. The officer responded with the argument presented in the case of *Blazek v. City of Iowa City*, 761 F.3d 920 (8th Cir. 2014) (Reviewed in the 3rd QTR CALL). But the Court recognized that "*Blazek* and *Wertish [v. Krueger*, 433 F.3d 1062 (8th Cir. 2006)] do not establish that the slightest resistance justifies any subsequent use of force by an officer… They instead establish that an officer may use "somewhat more force" on a "passively resistant" suspect." *Karels v. Storz*, 906 F.3d 740, 746 (8th Cir. 2018).

Please note that the initial use of force by law enforcement was directed not at placing the supect in had cuffs, but to moving her hand to an ash can to extinguish a cigarette. This is an important distinction and likely compelled the result. Had officers in that case simply taken the cigarette away from the suspect then placed her in cuffs, the result may have been different. However, that is only speculation, given the amount of injury the subject received.

The concept of proportionality appears to be taking hold in this case. It will be even more notable in the case of *Kelsay v. Ernst*, a case cited and distinguished here.

Use of Force; Proportionality, Part II *Kelsay v. Ernst*

Presented by: David Phillips, Deputy City Attorney

A small in stature, non-violent suspect was tackled to the ground and sustained injury while being arrested for a misdemeanor violation. Law enforcement gave no warning of the act. The arresting deputies, their department and the city were sued under 42 U.S.C. § 1983 alleging Civil Rights violations in the conduct of the arrest.

Facts.

> On May 29, 2014, Kelsay, her three children, and her friend Patrick Caslin went [**2] swimming at a public pool in Wymore, Nebraska. Caslin engaged Kelsay in what she described as "horseplay," but some onlookers thought he was assaulting her, and a pool employee contacted the police.
>
> As Kelsay and her party left the pool complex, they encountered Wymore Police Chief Russell Kirkpatrick and Officer Matthew [*1083] Bornmeier. Kirkpatrick informed Caslin that he was under arrest for domestic assault and escorted him to a patrol car. Kelsay was "mad" that Caslin was arrested. She tried to explain to the officers that Caslin had not assaulted her, but she thought that the officers could not hear her.

According to Kirkpatrick, Caslin became enraged once they reached the patrol car and resisted going inside. Kirkpatrick says that after he secured Caslin in handcuffs, Kelsay approached the patrol car and stood in front of the door. Kirkpatrick claims that he told her to move three times before Bornmeier escorted her away so that Kirkpatrick could place Caslin into the patrol car.

Kelsay denies approaching the patrol car until after Caslin was inside the vehicle. At that point, while Kirkpatrick interviewed witnesses, she walked over to the car to talk to Caslin. Bornmeier told her to [**3] back away from the vehicle, and Kelsay complied. Two more officers—Deputy Matt Ernst and Sergeant Jay Welch from the Gage County Sheriff's Office—then arrived on the scene. When they appeared, Kelsay was standing about fifteen feet from the patrol car where Caslin was detained, and twenty to thirty feet from the pool's exit doors. Kelsay's younger daughter was standing next to her; her older daughter and son were standing by the exit doors. Kelsay stood approximately five feet tall and weighed about 130 pounds.

Kirkpatrick told Ernst and Welch that Kelsay had interfered with Caslin's arrest. According to Welch, Kirkpatrick explained that Kelsay tried to prevent Caslin's arrest by "trying to pull the officers off and getting in the way of the patrol vehicle door." Kirkpatrick thus decided that Kelsay should be arrested.

In the meantime, Kelsay's older daughter was near the pool exit doors yelling at a patron who the daughter assumed had contacted the police. Kelsay started to walk toward her daughter, but Ernst ran up behind Kelsay, grabbed her arm, and told her to "get back here." Kelsay stopped walking and turned around to face Ernst, at which point Ernst let go of Kelsay's arm. Kelsay [**4] told Ernst that "some bitch is talking shit to my kid and I want to know what she's saying," and she continued walking away from Ernst and toward her daughter.

After Kelsay moved a few feet away from Ernst, the deputy placed Kelsay in a bear hug, took her to the ground, and placed her in handcuffs. Kelsay momentarily lost consciousness after she hit the ground. When she regained her senses, she was already handcuffed, and she began screaming about pain in her shoulder.

Ernst drove her to the Gage County jail, but corrections officers recommended that Kelsay be examined by a doctor. Kirkpatrick took Kelsay to a hospital, where she was diagnosed with a fractured collarbone. Kelsay ultimately was found guilty of two misdemeanor offenses after pleading no contest to attempted obstruction of government operations and disturbing the peace.

Kelsay v. Ernst, 905 F.3d 1081, 1082-83 (8th Cir. 2018)

Law.

"The dispositive question is whether the violative nature of particular conduct is clearly established." *Kelsay v. Ernst*, 905 F.3d 1081, 1084 (8th Cir. 2018).

It was not clearly established in May 2014 that a deputy was forbidden to use a takedown maneuver to arrest a suspect who ignored the deputy's instruction to "get back here" and continued to walk away from the officer. Id., (quoting *Ehlers v. City of Rapid City*, 846 F.3d 1002 (8th Cir. 2017)). *Ehlers v. City of Rapid City* was reviewed in 3rd QTR 2017 CALL.

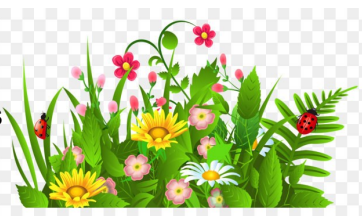
Analysis.

In this case, a law enforcement officer gave a command, which was ignored, then came up behind the non-complying suspect and tackled her. The suspect was substantially smaller than the law enforcement officer. After the initial command was given and ignored, no subsequent warning about use of force was given.

The majority compared the case to *Ehlers v. City of Rapid City* and concluded that the non-compliance could be interpreted by law enforcement officers as resistance and that force could then be justifiable used. Qualified immunity was granted under this limited analysis.

The notable issue in this case is not the majority opinion. It is the dissent. Chief Judge Lavensky Smith had a different opinion about the outcome. While Chief Judge Smith acknowledged the analysis and settled law, he brought out two key points. First, he noted that no verbal warning preceded the use of force. Secondly, he compared the physical abilities of the law enforcement officer to those of the subject and observed a striking disparity.

Generally speaking, warnings about the use of force are not specifically required under current law. A recent case involving warning and use of deadly force was *Rogers v. King*, No. 16-4209, 2018 U.S. App. LEXIS 7314, (8th Cir. Mar. 23, 2018), reviewed in 2nd QTR 2018 CALL. In that case, a woman was fatally shot by deputies seeking her arrest. The decedent in that case was wielding a knife and some awkwardness in the



apprehension plan led to her death. The Court there held that "[w]hen feasible an officer should first give a warning that he will use deadly force." *Id* at *8.

The holding dealt with deadly force. Additionally, the "when feasible" clause would seem to virtually nullify the requirement. This would appear to suggest that the law favored the action of the deputy in the manner of arresting Kelsay.

The dissenting Chief Judge's recitation began with the observation "[b]ut, "in an obvious case," the clearly-established prong can be met "even without a body of relevant case law."" *Kelsay v. Ernst*, 905 F.3d 1081, 1086 (8th Cir. 2018). Under this view, the officer should have known that such an act would not be justifiable. In other words, some factual situations are so obvious that no prior warning of case law to the law enforcement community is necessary. This perspective presents some rather interesting implications.

Until now, law enforcement officers have only been held to account where case law established a standard "beyond debate." By applying the standard of review suggested by the Chief Judge, not only would the "beyond debate" standard of warning become less controlling, but a far more difficult standard of proportionality starts to take hold.

In *Karels v. Storz*, a female subject was forced to extinguish a cigarette and as a result, her arm was broken. Qualified immunity was denied based on existing law. The act of applying force to a non-resisting, non-violent subject was acknowledged in, *inter alia*, *Blazek v. City of Iowa City*, 761 F.3d 920 (8th Cir. 2014) (Reviewed in the 3rd QTR 2014 CALL). In the case at bar, the officers were given qualified immunity, again based on existing law.

Dissenting opinions are not law. But, given the source of the dissent, look for more to come from this if some members of law enforcement continue to engage in the reviewed conduct. Should a doctrine of proportionality supplant the existing standard of reasonableness, the legal battlefield geometry of law enforcement will be greatly complicated.

Arkansas Court of Appeals Holds Admissible Evidence Obtained From Use of Drug Dog Following Vehicle Stopped for No Insurance

Presented by: David Phillips, Deputy City Attorney

Facts Taken From the Case:

Donald Cagle entered a conditional plea of guilty to one count each of possession of methamphetamine with purpose to deliver and possession of drug paraphernalia. His conditional plea reserved his right to appeal from the circuit court's denial of his motion to suppress evidence.

Cagle was pulled over for alleged traffic violations by Officer Keith Shelby of the Fort Smith Police Department. During the traffic-violation investigation, Officer Shelby conducted a canine search and found contraband in Cagle's car. Cagle was arrested on charges of possession of methamphetamine with purpose to deliver and possession of drug paraphernalia. At the hearing on the motion to suppress evidence, the circuit court heard

evidence that Shelby effectuated a traffic stop of a Chevy Tahoe driven by Cagle. Shelby observed the Tahoe traveling northbound. Cagle initially had his turn signal on; however, when he saw Shelby and his marked patrol unit, he "acted nervous, turned his blinker off, and kept going straight." Based on this, Shelby pulled in behind the Tahoe and ran its tags. Shelby discovered that there was no insurance on file for that vehicle and began to follow the Tahoe. Cagle turned into a Mini Mart parking lot without activating his turn signal one hundred feet before the turn. Shelby believed that Cagle was trying to evade him, so he pulled in behind the vehicle at the gas pump and activated his blue lights. Cagle got out of his car and appeared nervous and acted as though he did not want Shelby looking in the vehicle. Shelby asked multiple times for consent to search the vehicle, which Cagle eventually denied. Shelby then got his canine out of his car and had the dog perform a sniff of Cagle's vehicle. The dog alerted twice on the Tahoe, and Shelby's subsequent search uncovered a "rather large bag" of methamphetamine and a meth pipe. The court reviewed a video of the incident. According to the video, no more than eight minutes elapsed between Shelby's initial contact with Cagle and the discovery of the drugs. The circuit court found that four separate issues justified Shelby's decision to stop Cagle's vehicle: (1) Cagle's "last-second decision" to abandon his turn when he saw the officer's vehicle; (2) the lack of valid insurance on Cagle's vehicle; (3) Cagle's failure to activate his right-hand-turn signal more than one hundred feet before his turn into the gas-station parking lot; and (4) the totality of the previous circumstances leading Shelby to believe that Cagle was attempting to evade or avoid him. The court found that the "possible insurance violation and the obvious turn signal violation in and of themselves individually justified the traffic stop."

Argument and Decision by the Arkansas Court of Appeals

On appeal to the Arkansas Court of Appeals, Cagle challenged that Shelby had probable cause to stop Cagle's vehicle. In setting for the to believe that an offense has been committed by the person suspected. In assessing the existence of probable cause, the Court's review is liberal rather than strict. The relevant inquiry is whether the officer had probable cause to believe that the defendant was committing a traffic offense at the time of the initial stop. Whether a police officer has probable cause to make a traffic stop does not depend on whether the driver was actually guilty of the violation that the officer believed to have occurred.

In addressing the lack of insurance on Cagle's vehicle, the Court pointed to Arkansas Code Annotated section 27-22-104(a)(1)(b), which provides that it is "unlawful for a person to operate a motor vehicle within this state unless the motor vehicle and the person's operation of the motor vehicle are each covered by . . . [a]n insurance policy issued by an insurance company authorized to do business in this state." The Court noted that "a failure of the Vehicle Insurance Database . . . to show current insurance coverage at the time of the traffic stop creates a rebuttable presumption that the motor vehicle or the person's operation of the motor vehicle is uninsured." The Court noted that in *Small v. State*, 2018 Ark. App. 80, it affirmed the denial of a motion to suppress when the officer initiated a traffic stop after he ran the defendant's tags and discovered that the defendant's insurance had been canceled. The Court said that it expressly held that "[t]he lack of insurance information in the database was sufficient to provide Officer Hoegh with probable cause to believe that a traffic violation had occurred." The Court stated that Officer Shelby testified that he routinely runs tags for proof of insurance, and in his experience, the database is accurate more than 90 percent of the time. The Court concluded that the lack of insurance information in the database was sufficient to provide Shelby with probable cause to believe that a traffic violation had occurred. Accordingly, the circuit court's reliance on this fact to deny Cagle's motion to suppress was affirmed.

Next, Cagle argued that, even if the traffic stop was lawful, the subsequent search of his vehicle was unlawful because Shelby had abandoned his investigation of the insurance-coverage violation—i.e., the purpose of the stop—by the time he decided to run his drug dog around Cagle's vehicle. At the suppression hearing, the court

heard evidence that Shelby requested permission to search Cagle's Tahoe. Cagle responded that he wanted to speak to his attorney first and eventually denied consent.

The Court said that as part of a valid traffic stop, a police officer may detain a traffic offender while the officer completes certain routine tasks, such as computerized checks of the vehicle's registration and the driver's license and criminal history, and the writing up of a citation or warning. During this process, the officer may ask the motorist routine questions, such as his destination, the purpose of the trip, or whether the officer may search the vehicle, and the officer may act on whatever information is volunteered. However, after those routine checks are completed, unless the officer has a reasonably articulable suspicion for believing that criminal activity is afoot, continued detention of the driver can become unreasonable. The Arkansas Supreme Court has held that a stop is not completed until the driver's license and any accompanying paperwork is returned.

Cagle conceded that he had not produced his insurance paperwork by the time Shelby retrieved his dog, Ringo, from his police vehicle. He nonetheless claimed that Shelby "unreasonably prolonged" the detention in order to conduct the canine sniff. The circuit court reviewed a copy of Shelby's dashcam video, finding that less than seven minutes elapsed between the initial contact between Cagle and Shelby and the canine sniff. The circuit court noted that the first three and a half minutes of the stop were spent "engaged in conversation involving insurance coverage and other matters, primarily small talk." The court further found that "[a]t the time the search began the insurance issue had not been resolved as [Cagle] can still be observed holding papers and rifling through them in a search for his proof of insurance." The Court said that its review of the dashcam video supported the circuit court's factual findings on this point. The encounter lasted less than eight minutes, and by the time the dog sniff was conducted, Shelby still had not retrieved any insurance paperwork. The Court held that because the purpose of the stop had not concluded by the time Shelby deployed his drug dog, the circuit court did not clearly err in concluding that the detention of Cagle was not unreasonably prolonged. Therefore, the Court affirmed the circuit court's denial of Cagle's motion to suppress.

Case: This case was decided by the Arkansas Court of Appeals on February 6, 2019, and was an appeal from the Sebastian County Circuit Court. The case citation is *Cagle v. State*, 2019 Ark. App. 69.

Qualified Immunity and Deprivation of Rights The "Conscience-Shocking" Element

Presented by:
Taylor Samples
Senior Deputy
City Attorney

Dwayne Andrews fired two shots from a rifle toward police officers during what he claimed was a PTSD episode in 2003. A psychologist opined that he was fit to proceed, but that he was not criminally responsible for his acts under Missouri law. The prosecution and defense stipulated to his condition and he was acquitted on mental grounds and placed into a residential treatment program.

In 2010 the Department of Mental Health petitioned the Court for release. That petition was opposed by the prosecutor and he was not released. In 2012 he was released and filed suit in 2013 alleging his rights under 42 U.S.C. §1982 were violated by members of the Department of Mental Health.

A defense to the allegation of civil rights violation is the doctrine of qualified immunity. "Qualified immunity protects a government official from liability in a section 1983 action unless the official's conduct violated a clearly

established constitutional or statutory right of which a reasonable person would have known." *Andrews v. Schafer*, 888 F.3d 981, 983 (8th Cir. 2018). While this aspect of qualified immunity is well known, the standard to overcome qualified immunity was the focus of this case.

As a preliminary matter, the Court agreed with Andrews that he was entitled to be released once he was found to be either "no longer dangerous or no longer mentally ill," *Id* at, 984, which the Department had found as early as 2010. The Court also noted that the law suit was not for release, which had already been granted, but an action against officials at the department.

To prove that the plaintiff, Andrews, was entitle to relief, he had to show that "the [state defendants'] conduct was conscience-shocking, and that the [state defendants] violated one or more fundamental rights that are deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id*. The Court further noted that "[t]o shock the conscience the defendants' conduct must be "so severe . . . so disproportionate to the need presented, and . . . so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience."" *Id*.

In the case of *De La Rosa v. White*, No. 15-3399, 2017 U.S. App. LEXIS 5273, at *1-2 (8th Cir. Mar. 27, 2017), the US Eighth Circuit Court of Appeals noted that to be "beyond debate" an act must be clearly on point as prohibited. This means that a case involving the precise circumstances must have been before the Court on a previous occasion with the results being adverse to law enforcement. (CALL, 2nd Qtr. 2017).

The second prong of analysis has to do with shocking the conscience. In the context of criminal investigations, examples of conscience-shocking behavior include falsifying evidence and coercing testimony. "Defendants may be held liable if they recklessly ignored evidence suggesting the Plaintiffs' innocence or systematically pressured witnesses to manufacture false testimony to fill gaps in an investigation." *Winslow v. Smith*, 696 F.3d 716, 734 (8th Cir. 2012). In Winslow, officers repeatedly threatened the suspect with execution if he did not cooperate. The Court quoted *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997) Which stated "[t]o hold that police officers, having lawfully arrested a suspect, are then free to fabricate false confessions at will, would make a mockery of the notion that Americans enjoy the protection of due process of the law and fundamental justice." *Id*.

Andrews could show no such malicious behavior. The underlying dismissal was affirmed.

Presented by: David Phillips, Deputy City Attorney

Reckless Investigation as a Policy—*Dean v. Searcey*

Six individuals were investigated and subsequently charged in the 1985 rape and murder of a Beatrice, Nebraska woman. All but one of the suspects pled guilty to various charges and all were sentenced and served from five to twenty years before being exonerated by DNA evidence in 2009. The individuals sued the officers and Gage County under 42 U.S.C.§ 1983 and 42 U.S.C. §1985. Qualified immunity was denied and the suit went to trial. The plaintiffs were awarded over $28 million by a jury. This appeal was taken after the jury trial.

Facts.

Four years after the local police and FBI concluded their unsuccessful investigation into the rape and murder, the County Sheriff opened his own investigation. One of his deputies, Deputy Price, was also a licensed psychologist.

Deputy Price used systematic pressure in his investigation to implicate the defendants in the face of "contrary evidence." One example was the presence of blood, found at the crime scene, which did not match the type of any suspect. Price also encouraged subjects to use "unconscious recall" to remember facts, some of which were provided by Price. The suspects were of diminished capacity and susceptible to such abuses. Additionally, Price had a prior clinical relationship with two of the suspects.

Another tactic used to expand the pool of suspects was to conduct a line-up for the suspects to select possible accomplices. An affidavit for arrest was prepared by another deputy falsely claiming corroboration.

Testimony at trial showed that the Sheriff, now deceased, had participated in interviews during the investigation. However, the jury subsequently found that the Sheriff had not directed the fabrication of evidence.

Law.

Manufacturing evidence, under color of law, is a constitutional tort and is actionable under 42 U.S.C.§ 1983.

A municipal entity "may not be found liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Dean v. Searcey*, 893 F.3d 504, 511 (8th Cir. 2018). For a municipality to be held liable for a constitutional violation, a policy-making official must have directed, authorized, or agreed to the act in question. *Id*.

Analysis.

This appeal was brought by the County and not by individual officers who had also been found liable at trial. As such the appeal focused on separating the County from actions of individual officers. The County's theory under appeal was that, where the one policy-maker involved in this case was cleared of wrong-doing, no liability could attach to the county.

The Court of Appeals disagreed. The evidence of falsification of evidence was overwhelming. The Court held that participation in or even awareness of the investigation itself could be interpreted by a jury as direction or authorization of the tactics used in that investigation.

The judgment against the county, in the amount of $28 million, was affirmed.

Presented by: David Phillips, Deputy City Attorney

Driving or Boating While Intoxicated, A.C.A. 5-65-103— The Basics

The decision to charge someone with the offense of Driving or Boating While Intoxicated, a violation of Arkansas Code, Annotated, section 5-65-103, must be based on several foundational prerequisites. This article is a review of evidence sufficiency and introduction of evidence at trial. We have the 2015 legislature to thank for the fact that our DWI and BWI laws were then combined into the same statue. This article does not cover probable cause for the traffic stop and does not go into depth about implications of *Miranda v Arizona* in suspect interrogation.

Driving

Under the statute, this element can be proven by either observed driving or "Actual Control of Vehicle." The Court automation system Virtual Justice lists ACV as a different charge. Contrary to popular belief, ACV is actually the same statute as DBWI but is an alternative means of proving the charge.

Vehicle operation: The term "driving" is not defined in statutory law. Basically, if the vehicle can be shown to be running, it is operating or driving, as movement is not a requirement for driving. An automobile at a stop light waiting for the green light is still driving, though it is not moving.

A violation of the DBWI statute does not require operation on a highway or public road. DBWI is a recognized and enumerated exception to the "highway requirement" that must be proven for most traffic offenses. See A.C.A. 27-49-102 for how the highway requirement applies to other offenses.

Driving, operating or controlling a vehicle may be proved by either direct or by compelling circumstantial evidence. *Azbill v. State*, 285 Ark. 98 (1985). Where the arresting officer personally observed the vehicle being driven and obtained probable cause of DBWI through personal observation, this element is not likely to be contested. But where the officer is called to a traffic accident or to a suspicious driver call after the fact, some evidence must be obtained to convince a skeptical judge or jury that the suspect was indeed the driver and was driving. The best way is to identify a cooperative witness and the very best witness of all, short of the officer, is the suspect. As part of your investigation, make sure you ask the suspect if the suspect was driving.

Time Line: Per A.C.A. 5-65-206, the offense must be proven to have taken place within four hours of any testing. This is foundational. If the time-line cannot be proven, the results of any chemical testing cannot be admitted. This is known in legal terms as "convergence." All the elements have to have converged in time and circumstance to sustain a conviction. Showing that someone was driving on one day and then drunk on another day cannot prove the case. By statute in Arkansas, there is no convergence after four hours. While any relevant circumstantial evidence may be introduced in Court to prove timing, the totality of evidence must cause the finder of fact to accept, beyond a reasonable doubt, when the alleged driving took place.

The best evidence of when the driving took place may come from the same source as the evidence of driving itself - the suspect. Never overlook the utility of suspect interrogation. Perhaps there are witnesses. If so, get names and contact information per ARCrP Rule 3.5.

Some Officers have used, or attempted to use engine block heat dissipation as an indicator of the timeline. If you have a good basis of knowledge in such matters, it may be persuasive. But some type of circumstantial evidence must be obtained to prove the timeline.

Actual Control: "Key in the ignition" is the bright-line rule for ACV cases. This goes to "authority to manage" as articulated in *Rogers v. State*, 94 Ark. App. 47 (Ark. App. 2006). However, the *Rogers* case was based on expert testimony about technology that is largely now antiquated. The Rogers case involved a Cadillac Escalade manufactured prior to 2004 that could be remotely started, but could only be driven away once an actual key was inserted into the ignition. Though many cars still use traditional ignition key technology today, an ever increasing percentage now have "push-to-start" ignitions, which allow full vehicle operation once a transmitting "fob" is in or near the vehicle. I would encourage law enforcement officers to consider the presence of an enabling key fob to serve as being comparable to the "key in the ignition" standard.

Reporting Parties: As previously stated, witnesses to the event can be helpful in a variety of ways. But even when the reporting party is anonymous, an initial traffic stop can be justified. In the case of *Frette v. City of Springdale*, 331 Ark. 103 (2011), the Arkansas Supreme Court held that, where the information is from a known caller, the information is considered to be reliable. In the US Supreme Court case of *Navarette v. California*, an anonymous caller alleged that a vehicle had run her off the road. The call included a vehicle description and location. The Court in that case concluded that the anonymous caller had "reported more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving. Instead, she alleged a specific and dangerous result of the driver's conduct: running another car off the highway." *Navarette v. California*, 572 U.S. 393, 403, 134 S. Ct. 1683, 1691 (2014). Under that ruling, a sufficiently described vehicle at a specified location could serve as corroboration and justify an investigative stop in an allegation of Driving or Boating While Intoxicated where specific examples of dangerous driving are provided.

Intoxication

To prove intoxication, the State must show by compelling evidence that the vehicle driver, operator or controller EITHER was "intoxicated" OR had an "alcohol concentration in the person's breath or blood … eight hundredths (0.08) or more based upon the definition of alcohol concentration in § 5-65-204." A.C.A. § 5-65-103. The statute further defines "intoxicated" as "influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination of alcohol, a controlled substance, or an intoxicant, to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury or death to himself or herself or another person…" A.C.A. § 5-65-102. To prove this, the arresting officer must show a substantial impact, either through examples of observed dangerous driving, or by recognized objective testing, or preferably by both.

Field Sobriety Testing: Review video of FST to ensure your narrative harmonizes with the captured images. If clues are observed that are not readily apparent in the images displayed in video recordings, explain why in detail in your reports.

Rights Warning DWI Versus Miranda Warning: Where a testing sample is sought for State analysis, whether the sample is blood, breath, urine or saliva, the suspect must be fully informed of the Arkansas Statement of Rights regarding DBWI chemical testing. Each agency has its own form and they vary in composition slightly. But each form is designed to warn a DBWI suspect of the effect of the implied consent laws of the State of Arkansas. This warning is provided before Miranda warnings. Custodial interrogation should not take place until after the DBWI rights warning have been provided and any testing samples are obtained. Otherwise, the investigating law enforcement officer runs the risk of creating "inherent confusion" *Carroll v. State,* 309 Ark. 158, (1992).

Portable Breath Test: The Portable Breath Test (PBT) device readings have so far not been admissible at trial because the devices themselves have not been certified by a state agency. To say that they are universally not admissible is not, however, correct. PBT readings may be admitted at a suppression hearing as evidence of the

Officer's state of mind and to support probable cause for arrest. Additionally, the existence of a PBT sample may be acknowledged, without comment on the number result, as evidence in the case-in-chief if the Defendant is charged with Violation of Implied Consent to show consciousness of guilt. As with any evidence, admission or suppression is at the discretion of the Court.

State Test: Blood, Breath, Urine, Saliva: Each substance sought by law enforcement for examination has its own unique procedure for collection. Each procedure is outlined in Arkansas Regulations for Alcohol Testing, Fifth Revision, January 24, 2013. To preserve the results for admission at trial, the law enforcement officer must show substantial compliance with all state regulations for collection. A.C.A. 5-65-203(b)(1)(A). *Goode v. State*, 303 Ark. 609 (1990).

Foundational requirements must be met for any testing results to be admitted into evidence at trial. In summary, for blood, two grey-top vials with anticoagulant coating must be obtained by a physician, nurse or phlebotomist under the guidance or supervision of a physician, who need not be physically present at extraction (*Gavin v. State*, 309 Ark. 158 (1992)) and the subject must affirmatively express consent (*Dortch v. State*, 2018 Ark. 135 (2018)) or a warrant must be obtained for blood collection. For urine collection, the sample must be taken approximately one half hour after the suspect's bladder was fully purged. Breath samples are taken per operating instructions in the Intoximeter EC/IR II Senior Operator Training Manual, Revised March 2014.

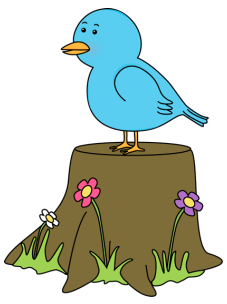
Second Test: For any testing, the suspect must be offered a Second Test, if so desired. The offer should be made in writing and acknowledged in writing by the suspect. If so requested, law enforcement must make reasonable efforts to assist the suspect in obtaining a second test. See *McEntire v. State*, 305 Ark. 470 (1991). This notice and assistance is only required if the first test sample or samples are successfully obtained. *Id*.

Presumptions: Arkansas Code, Annotated, section 5-65-206. Where a sample of blood, breath, saliva or urine are collected and analyzed, a result equal to or greater than 0.08 percent weight/volume creates the rebuttable presumption of intoxication. Please note that I said "intoxication" and not "impairment." Impairment is a different legal term of art which has a different meaning. Do not confuse the two terms.

EC/IR-II Intoximeter: This device was fielded in the mid to late 2000's and is the principle system in Northwest Arkansas for breath analysis. It has an accuracy level of +.003 to -.007, according to the Intoximeter EC/IR II Senior Operator Training Manual, Revised March 2014. This bias means it is skewed in favor of the tested subject. But that standard is a generic standard and has nothing to do with individual machine accuracy or specific sample accuracy. Initial system testing in 2010 by the Office of Alcohol Testing, Arkansas Department of Health revealed a system-wide reliability of ±.003. Deposition, Laura Bailey, *State v. Smith, et. al.*, 12/7/2010.

A twenty minute observation period is necessary to complete a breath test. This is an internal parameter of the EC-IR II, and is a recognized foundational requirement under existing case law. During this period of time, the subject must not have exhibited any acts or conditions that might invalidate the test. If such conduct is observed, such as trying to force a burp, do not test the individual. Where multiple unsuccessful attempts are made, cease testing. In either case, consider charging the subject with a violation of the Arkansas Implied Consent Law.

Admissibility of partial results: The EC-IR II requires 2 complete samples to arrive at a successful result. Where only one sample is provided, the result is considered incomplete. Courts are usually reluctant to admit only one sample. Even if admitted into evidence, a single sample would not qualify for a presumption of intoxication. However, the degree of resistance to the test may be admissible to show consciousness of guilt. Be specific in your report narratives as to how the individual was failing to cooperate with conditions of the test.



ASCL and/or ADH: Two agencies in the State of Arkansas are certified to conduct chemical testing on properly collected samples and provide results which would qualify for a presumption of guilt, should the results fall within the specified ranges. They are the Arkansas State Crime Lab (ASCL) and the Arkansas Department of Health Office of Alcohol Testing. The later agency can only test for alcohol. The ASCL can test for alcohol and commonly encountered narcotics. The ASCL will usually provide concentrations for alcohol with the initial report but usually do not perform quantitative analysis on other substances unless requested. Ensure your request specifies "concentrations" on any substances you specifically want analyzed. Concentrations are only available for a short time after the initial testing as any remaining samples are disposed of, sometimes as quickly as 90 days after the initial test.

Alcohol v. Narcotics and Leeka v. State: The Arkansas Supreme Court case of Leeka v. State, 2015 Ark. 183 (2015) held that a mental state of purposely, knowingly or recklessly must be proven in all DWI cases. The State legislature convened to correct this oversight, but likely due to extensive lobbying, only took care of the Alcohol piece. Today, to prove a case of DBWI where drugs are the suspected intoxicant, the additional element of mental state must be proven. The evidentiary threshold for this is rather low and almost any evidence will suffice, such as the purposeful act of driving the car. Where any navigation can be shown, such as driving from point to point, the element is met. But no further interpreting case law exists on this element and all examples at this point are speculative.

Drugs and the DRE (The elusive third element): The state must show that the intoxication is the result of ingestion of either alcohol or a controlled substance or both. Where alcohol is not suspected, some means of determining what substance or type of substance must be employed. Admissions of drug use can be helpful. Narcotics or residue on the person or in the vehicle may also help in this determination. Where employed, the Drug Recognition Expert may be able to provide an opinion on the class of narcotics suspected and the degree to which symptoms are noted. But the DRE cannot render an opinion on the ultimate question of intoxication. Voluntary blood tests submitted to ASCL and resulting in no detected substances will be exculpatory and result in a verdict of “not guilty.”

Hospital Tests: In some cases, suspects wind up in the hospital and blood samples are tested by a hospital lab. The results of these tests may be obtained by subpoena, as the Healthcare Insurance Portability and Accountability Act, also known as HIPAA, does not prevent disclosure in a "Judicial Process." 42 U.S.C. § 1320d-7(b) (1998) But the information may not be dispositive at trial.

The hospital test does not qualify for a presumption, as, aside from the ASCL and the Office of Alcohol Testing, no local or regional hospital is certified by the State to perform such forensic tests. Additionally, that type of testing is not always performed. Finally, it is an unwritten rule that physicians will not testify in District Court. Therefore, only the unsubstantiated record could be admitted. That evidence, by itself, is not compelling.

Always seek a State blood test, by consent, if possible. Even where the suspect refuses, that refusal, though not independently incriminating, may be used as evidence of consciousness of guilt at trial.

Notorious Facts, Judicial Notice and Officer Testimony

Notorious Facts and Judicial Notice: Testing standards from recognized publications can be offered on judicial notice, but the Court is not required to acknowledge such facts. Not all regulatory facts are notoriously known and the Court is not required to recognize a fact as notorious. Such facts include reliability of testing devices, testing techniques, testing procedures and machinery specifications. But, where an officer testifies to a fact that contradicts a fact at judicial notice or notorious awareness, it is up to the Court

as to which version of that fact will be accepted in that case.

Officer Testimony: Officer testimony in Court is normally the glue that binds all evidence together in a DBWI case. Case law has held that Courtroom testimony can overcome other case deficiencies. *Yarbrough v. State*, 370 Ark. 31, 40, 257 S.W.3d 50, 57 (2007). Officers testifying in any case must be highly knowledgeable of the facts of that case and be objective in their presentation. During testimony, state your observations and the methods used to arrive at any reasonable conclusions you made. If invited by counsel to speculate on different, hypothetical facts, remember that your initial conclusions were based on observed facts, not speculation. Authoritative, knowledgeable and genuine testimony offered without equivocation will always be persuasive and will have the ring of truth.

Conclusion.

Law Enforcement Officers make or break DBWI cases. Gathering the evidence in a manner so as to preserve it all for trial is an Officer responsibility, as is overall case organization and preparation. Prosecutors merely present the admissible portions of the file on trial day. The focus is on the police, not on the attorneys.

Where any criminal case, to include DBWI, obviously fails for want of probable cause, a prosecutor has a duty under Arkansas Rules of Professional Conduct, Rule 3.8., Special Responsibilities of a Prosecutor, to not prosecute the case. In extreme cases where an arrest is made and probable cause is shockingly absent, the Law Enforcement Officer could be found liable under A.C.A. 5-53-131, Malicious Prosecution, Class A misdemeanor.

Where compelling evidence is properly obtained and preserved, cases will often be settled by plea without any requirement of the Officer's presence in Court on that case. A strong case file full of admissible evidence promotes effective plea bargaining to avoid trials and facilitates the proper verdict in the trials that are demanded.

The Constitutionality of the Arkansas Disorderly Conduct Statute

Presented by: David Phillips, Deputy City Attorney

This case stems from an arrest during a demonstration in Little Rock. The subjects were charged with violations of city ordinances and the disorderly conduct statute, A.C.A. section 5-71-207. This article will be limited to the portion of the case dealing with that statute and its constitutionality.

Facts.

> In September 2012, Holick organized a [**4] multi-day outreach in Little Rock, which involved demonstrations against abortion in front of a Little Rock high school and the Clinic.
> …
> One of the complainants was Gayle Teague, an employee of a vision center located near the Clinic. Teague testified that she could hear the demonstration in her clinic and told officers the noise was disrupting her business. [**5] She noted that protests were common in front of the Clinic, but this was the only time she could recall hearing sound from a demonstration [*862] in

her office. Lori Williams, the Clinic's Clinical Director, complained to officers the sound was too loud for the Clinic to function. She testified that she could hear sound from the demonstration in a private counseling room while she was attempting to speak with a patient. She said that some patients canceled appointments in response to the demonstration, and that she saw demonstrators blocking the Clinic's driveway.

Duhe v. City of Little Rock, 902 F.3d 858, 860 (8th Cir. 2018)

Law.

(a) A person commits the offense of disorderly conduct if, with the purpose to cause public inconvenience, annoyance, or alarm or recklessly creating a risk of public inconvenience, annoyance, or alarm, he or she:
* * * *
(2) Makes unreasonable or excessive noise . . . [or]
(5) Obstructs vehicular or pedestrian traffic . . . .

Ark. Code Ann. § 5-71-207(a)(2), (5).

Analysis.

The plaintiffs had alleged that the Arkansas statute was both vague and overbroad. They claimed that it did not give adequate notice as to what conduct is prohibited. Additionally, they claimed that this lack of notice would have a chilling effect on protected First Amendment activities, such as public gatherings and free speech.

A law is considered constitutionally infirmed by vagueness if it fails to give "people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or it "encourages arbitrary and discriminatory enforcement." *Duhe v. City of Little Rock*, 902 F.3d 858, 863 (8th Cir. 2018). Some degree of vagueness will accompany any codified law. But the ordinary degree of vagueness inherent in any statute is overcome by requirement of proof beyond a reasonable doubt for conviction. Where there is disagreement as to what fact is being proven, excessive vagueness is possible.

In this case, plaintiffs singled out the terms "inconvenience, annoyance and alarm" as lacking specificity. But the Court noted that the Arkansas statute, unlike those of other jurisdictions, had a "*mens rea*" requirement. The Arkansas statute requires proof of some degree of intent. In this case, a purposeful act must be proven. Arkansas Code Annotated, section 5-2-202 further defines just what a purposeful act is. The Court held that this distinction put the public on notice as to what conduct is being prohibited.

In reviewing the phrases "unreasonable or excessive noise" and "obstructs pedestrian or vehicular traffic, " the Court held that the terms are "widely understood restrictions that "require no guess[ing] at [their] meaning." *Id*. They stated that the extraordinary act of declaring a statute overbroad was not warranted in this instance. As an aside, the Court noted that attempting to proscribe behavior involving loud noise by setting decibel levels is unduly complicated.

The disorderly conduct statute is a constitutional means of achieving legitimate state interests of regulating traffic and limiting noise in populated areas of the state and as such, serves a substantial public purpose. As such, the doctrine of "narrowly tailored/least restrictive" does not apply. Even so, the statute was found to be content neutral and sufficiently narrowly tailored so as to allow the exercise of constitutionally protected rights.

The convictions were affirmed and Ark. Code Ann. § 5-71-207, disorderly conduct, was held to be neither impermissibly vague nor substantially overbroad.

Presented by: David Phillips, Deputy City Attorney

Use of Arm-Bar Takedown Still Acceptable, If Force May be Used—*Neal v. Ficcadenti*

The United States Court of Appeals for the Eight Circuit maintained its holding in *Blazek v. City of Iowa City* in this case by again holding that any use of force on a compliant subject is unreasonable. The decision, rendered on an interlocutory appeal, cleared the way for trial in that case. The Eighth Circuit reviewed each act in a series of actions and determined that one act, that of roughly lifting a subdued, hand-cuffed individual from the floor, could arguably be the basis for a jury verdict against the officers and the City. The dissent argued that each act should be viewed in connection as an unbroken sequence of events, thus removing qualified immunity from the totality of events.

Facts.

> In the late evening hours of June 6, 2012, police officers responded to a call that a witness had seen a man retrieve a gun from a black sedan parked outside of Born's Bar, a tavern located on Rice Street in Saint Paul, Minnesota. At the scene, the officers discovered a black sedan containing three occupants, none of whom perfectly matched the description of the suspect. After apprehending the driver, the officers commanded Appellee Robin Neal and another passenger to get out of the car with their hands up.

The scene, which was captured on video, was chaotic. Music blared from Born's Bar. A police dog barked incessantly. Multiple officers, guns drawn, shouted multiple commands. Neal alighted from the sedan as directed with his hands up—but immediately began to act somewhat erratically. He spent a minute wandering [*2] around the sedan, dropped his hands at least five times, and failed to promptly follow a command that he walk towards the officers.

The appellant, Officer Daniel Ficcadenti, commanded Neal to come to him with his hands up. Neal finally complied. As Neal got within arm's reach, Officer Ficcadenti conducted an abrupt arm-bar takedown, injuring Neal. Neal brought this 42 U.S.C. § 1983 action alleging that Officer Ficcadenti applied excessive force when he brought Neal to the ground. The district court denied qualified immunity to Officer Ficcadenti, finding that the evidence when viewed in a light most favorable to Neal showed that in 2012 it was clearly established that the use of an arm-bar takedown technique on a suspect who was neither threatening nor resistant violated the Fourth Amendment's prohibition against unreasonable searches and seizures.

Neal v. Ficcadenti, No. 17-2633, 2018 U.S. App. LEXIS 18988, at *1-2 (8th Cir. July 12, 2018)

Law.

Use of force by law enforcement personnel must be objectively reasonable in light of the facts and circumstances known to the officer at the time. Reasonableness is determined "by looking at the particular circumstances of each case, including "the severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of the officer or others, and whether he [wa]s actively resisting arrest or attempting to evade arrest by flight."" *Neal v. Ficcadenti*, No. 17-2633, 2018 U.S. App. LEXIS 18988, at *8 (8th Cir. July 12, 2018) (quoting, 433 F.3d 1062, 1066 (8th Cir. 2006).

Any use of force on a subject who is neither resisting nor threatening is unreasonable and law enforcement officers have been on notice of this precedent since 2012, if not before. *Neal v. Ficcadenti*, No. 17-2633, 2018 U.S. App. LEXIS 18988, at *12 (8th Cir. July 12, 2018) (citing *Montoya v. City of Flandreau*, 669 F.3d 867, 873 (8th Cir. 2012)).

Analysis.

The Court reviewed agreed facts in comparison to the three elements of 1) severity of risk of the call itself, 2) immediate risk to the officers and 3) whether the subject was actively resisting arrest. These are the elements from *Wertish v. Krueger*.

The Court agreed with the officers that the call was a report of a man with a gun in a high crime area which implies a potentially dangerous situation. However, it was very significant that none of the three men from the black sedan matched the description of the subject of the call. This fact was immediately determined by officers at the scene. Additionally, none of the men constituted a threat to the officers, given the number of officers at the scene, their positions around the car, and the fact that most of them had weapons drawn and aimed at the sedan.

The Defendant officers suggested that Neal's walking around the car, despite instructions to walk toward the officers indicated that he was not complying with instructions and therefore resisting. The Court did not agree with this assessment. The Court noted that even the officers agree that, by the time the arm-bar takedown technique was applied, Neal was complying with instructions.

The Arm-bar takedown procedure was not itself addressed by the Court. So long as the need to use force is justifiable, the arm-bar takedown remains an available tool for law enforcement use in placing resisting subjects on the ground. No new law was created by this case.

Presented by: David Phillips, Deputy City Attorney